PATENT
Customer No. 22,852
Attorney Docket No. 05725.0470-01

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:	)	
	)	
Jean-Michel STURLA et al.	)	Group Art Unit: 1616
	)	
Application No.: 09/385,412	)	Examiner: Marina Lamm
	)	
Filed: August 30, 1999	)	
	)	
For: AEROSOL DEVICE CONTAINING A POLYCONDENSATE COMPRISING AT LEAST ONE POLYURETHANE AND/OR POLYUREA UNIT	)	

Mail Stop Appeal Brief--Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

TRANSMITTAL OF APPEAL BRIEF (37 C.F.R. 1.192)

Transmitted herewith in triplicate is the APPEAL BRIEF in this application with respect to the Notice of Appeal filed on January 7, 2004.

This application is on behalf of: ☐ Small Entity ☒ Large Entity

Pursuant to 37 C.F.R. 1.17(c), the fee for filing the Appeal Brief is:

☐ $165.00 (Small Entity)
☒ $330.00 (Large Entity)

TOTAL FEE DUE:

Notice of Appeal Fee	$330.00
Extension Fee	$110.00
Total Fee Due	$440.00

☒ Enclosed is a check for $440.00 to cover the above fees.

PETITION FOR EXTENSION. If any extension of time is necessary for the filing of this Appeal Brief, and such extension has not otherwise been requested, such an extension is hereby requested, and the Commissioner is authorized to charge necessary fees for such an extension to our Deposit Account No. 06-0916. A duplicate copy of this paper is enclosed for use in charging the deposit account.

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: April 6, 2004

By: _____
Adriana L. Burgy
Reg. No. 48,564

PATENT
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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Sir:

APPEAL BRIEF UNDER 37 C.F.R. § 1.192

In support of the Notice of Appeal filed January 7, 2004, and pursuant to 37 C.F.R. § 1.192, Appellants present, in triplicate, this Brief and enclose herewith a check for the fee of $330.00 required under 37 C.F.R. § 1.17(c).

This appeal is in response to the rejection dated July 9, 2003, of claims 1-29, which are set forth in the attached Appendix. This Brief is timely filed in view of the Notice of Appeal and Petition for Extension of time filed January 7, 2004, and the additional Petition for Extension of Time filed herewith, extending the period for filing this Brief until April 7, 2004. If any additional fees are required or if the enclosed payment is insufficient, Appellants request that the required fees be charged to Deposit Account No. 06-0916.

I. Real Party In Interest

L'ORÉAL S.A. is the assignee of record.

II. Related Appeals and Interferences

Appellants, Appellants' undersigned legal representative, and the assignee know of no other appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. Status Of Claims

Claims 1-29 are pending. No claims have been allowed.

IV. Status Of Amendments

No claim amendments have been made.

V. Summary Of Invention

The present invention relates to aerosol devices comprising a container, which contains, in a cosmetically acceptable medium, a polycondensate, such as a multiblock polymer, comprising at least one polyurethane and/or polyurea unit. Page 2, lines 1-3.

In the art of hair care, hair products for shaping and/or maintaining the hairstyle are spray compositions comprising a solution, usually an alcoholic or aqueous solution, and one or more materials, generally polymer resins (also known as fixing materials), the function of which is to form welds between the hairs. Page 1, lines 11-15. These spray compositions are most often packaged in an aerosol form. Page 1, lines 15-21. Aerosols, however, release volatile organic compounds (VOCs) that are harmful to the environment. Page 1, line 15-Page 3, line 5. Thus, there is a need to develop hair care compositions packaged in aerosol form and expel decreased amounts of VOCs. Page 2, lines 1-14.

The present inventors discovered that it is possible to prepare aerosol devices meeting at least one of the above needs by choosing the proper combination of a composition and a means for distributing this composition. Page 2, lines 15-18.

VI. Issues

Whether claims 1-29 are patentable under 35 U.S.C. § 103(a) over U.S. Patent No. 5,643,581 to Mougin et al. ("Mougin") in view of U.S. Patent No. 5,125,564 to Dunne et al. ("Dunne").

VII. Grouping Of Claims

Each claim of this patent application is separately patentable, and upon issuance of a patent will be entitled to a separate presumption of validity under 35 U.S.C. § 282. For convenience in handling this Appeal, however, the claims will be grouped in one group. Thus, pursuant to 37 C.F.R. § 1.192(c)(7), in this Appeal, the rejected claims will stand or fall together.

VIII. Argument

CLAIMS 1-29 ARE PATENTABLE UNDER 35 U.S.C. § 103(a) OVER U.S. PATENT NO. 5,643,581 TO MOUGIN ET AL. IN VIEW OF U.S. PATENT NO. 5,125,546 TO DUNNE ET AL.

A. The Examiner fails to establish a *prima facie* case of obviousness.

1. The criteria for making a prima facie case of obviousness are clearly set forth in the M.P.E.P. and in case law.

To establish a *prima facie* case of obviousness, the Office must meet three basic criteria. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to

modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. M.P.E.P. § 2143 (8th ed. Rev. 1, 2003).

"The Examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness." M.P.E.P. § 2142. In doing so, "all the words in a claim must be considered in judging the patentability of that claim against the prior art." *In re Wilson*, 424 F.2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970). Further, it is not sufficient to merely "find every element of a claimed invention in the prior art [and for] an examiner to use the claimed invention itself as a blue print for piecing together elements . . . Such an approach would be an illogical and inappropriate process by which to determine patentability." *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2d 1453, 1457 (Fed. Cir. 1998) (citations and quotations omitted). If an independent claim is nonobvious under Section 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 1076, 5 U.S.P.Q.2d 1596, 1600 (Fed. Cir. 1998) (citations omitted).

2. The criteria have not been met by the rejection of record.

In this instance, the Office has not met the requirements to establish a *prima facie* case of obviousness. Specifically, the Office has failed to establish that the combination of references teaches or suggests all the claim elements. Instead, as discussed at length below, the Office cites a combination of references that falls short of disclosing all the elements of claims 1-29 in the present application. Moreover, the

Office's conclusory statements do not amount to "sufficient evidence" to support that the references teach each and every claim element.

The Office asserts that Mougin "teach[es] cosmetic compositions containing a multiblock polycondensate containing a polysiloxane block and a polyurethane and/or polyurea block in an organic solvent." Office Action date January 10, 2003 at page 4. Further, the Office contends that Mougin provides that cosmetic compositions can be used in hair care products in the form of aerosols but Mougin "does not teach the specific container of the instant invention." *Id.* Instead, the Office relies on Dunne to teach "an aerosol container containing a propellant gas and having an initial flow rate of under 0.6 g/s and 0.35 mm nozzle diameter." *Id.* The Office concludes that a person of ordinary skill in the art would have "employ[ed] the aerosol containers of Dunne et al. for the aerosol hair care compositions of Mougin et al. for their art-recognized purpose." *Id.* As such, the Office rejected claims 1-29 under Section 103(a) as being obvious to one of ordinary skill in the art at the time the invention was made. *Id.*

B. The Office relies on Mougin to provide for the "at least one polycondensate comprising at least one sequence chosen from polyurethanes and polyureas" but this statement lacks each and every element in Applicants' claims.

As explained above, the law requires the Office to make explicit factual findings providing for all the claim limitations. These factual findings must teach or suggest each and every element of the rejected claims. *Wilson*, 424 F.2d at 1385; *see also In re Royka*, 490 F.2d 981, 984, 180 U.S.P.Q. 580, 583 (C.C.P.A. 1974). The Office's assertion that Mougin teaches "a multiblock polycondensate containing a polysiloxane block and a polyurethane and/or polyurea block in an organic solvent" does not provide

for each and every claim element of the rejected claims. In particular, neither Mougin or Dunne teach or suggest that the polycondensate be made up of an arrangement of blocks where the blocks are obtained from: (1) at least one compound with two active hydrogen atoms per molecule; (2) at least one diol containing at least one functional group chosen from acid radicals and salts thereof; and (3) at least one isocyanate chosen from di- and poly-isocyantes. *See* Appellants' claims 1, 28, and 29.

Instead, Mougin teaches that its polycondensate is prepared in a two stage process. Col. 3, lines 8-10. The first stage involves reacting (i) a polysiloxane and (ii) a diisocyanate whereby a new silicone is obtained. Col. 3, lines 10-17. In the second stage, the chains of the polycondensate obtained are coupled by means of a coupling agent chosen from diols and/or diamines and/or alcoholdiamines. Col. 3, lines 18-24. This disclosure, however, does not suggest or teach that the polycondensate be made up of an arrangement of blocks wherein the blocks are obtained from: (1) at least one compound with two active hydrogen atoms per molecule; (2) at least one diol containing at least one functional group chosen from acid radicals and salts thereof; and (3) at least one isocyanate chosen from di- and poly-isocyanates, as presently recited in Appellants claims. The Examiner also does not cite to specific language in Mougin to support that this arrangement or ingredients are suggested or taught nor do Appellants believe that any such exists in Mougin. Instead, the Office maintains its conclusory statement, i.e., Mougin teaches "a multiblock polycondensate containing a polysiloxane block and a polyurethane and/or polyurea block in an organic solvent." Office Action dated January 10, 2003 at page 4.

Examining the Office's citation supporting this broad statement, the cite is equally broad and nondescriptive. The Office's citation is to columns 3 through 8 and column 9, lines 34-48 in Mougin. *See* Office Action dated January 10, 2003 at page 4. This cite spans at least three pages of dual columns. Because this lengthy cite is without further reasoning or direction, it is unclear what the Office is relying on and if, in addition, it is relying on "what they assert to be general knowledge to negate patentabilty, [an if so, then] that knowledge must be articulated and placed on the record." *In re Lee*, 61 U.S.P.Q.2d 1430, 1435 (Fed. Cir. 2001). Applicants', however, cannot tell what the Office is relying on when the record provides only a conclusory statement of three pages of disclosure without further reasoning or direction.

The Federal Circuit has made it clear that the record must contain "substantial evidence" to support the Office's determinations of *prima facie* obviousness. *In re Zurko*, 258 F.3d 1379, 1386, 59 U.S.P.Q.2d 1693, 1698 (Fed. Cir. 2001). Specifically, unless "substantial evidence" found in the record supports the factual determinations central to the issue of patentability, the rejection is improper and should be withdrawn. *See id.*, 59 U.S.P.Q.2d at 1697-98.

In this instance, "substantial evidence" cannot be found. For example, there is no evidence of record suggesting that Mougin discloses the polycondensate is obtained from at least one diol containing at least one functional group chosen from acid radicals and salts thereof, other than the broad recitation at column 4, lines 17-24 that the coupling agents carry chemically anionizable or cationizable groups. "[A] reference must be considered not only for what it expressly teaches, but also for what it fairly

suggests." *In re Burckel*, 592 F.2d 1175, 1179, 201 U.S.P.Q. 67, 70 (C.C.P.A. 1979) (citations omitted).

Mougin teaches that in a second stage, the chains of polycondensate are linked by a coupling agent which is chosen from diols and/or diamines and/or alcoholamines. Col. 3, lines 17-24. Mougin's coupling agents are conventionally symbolized as OH-B-OH, NH_2-B-NH_2 or NH_2-B-OH. Col. 3, lines 59-62. It is radical 'B' that carries the "chemically anionizable or cationizable groups." Col. 4, lines 17-19. As such, a vast number of diols, diamines, alcoholamines, and mixtures thereof are encompassed by the generic formulas and the generic definition of 'B.' To that end, without further suggestions or identified parameters in Mougin to select a particular combination of variables giving rise to the recited combination, the disclosure is merely directed to endless possibilities, and thus, cannot render obvious Applicants recited claims. *See In re Baird*, 16 F.3d 380, 382, 29 U.S.P.Q.2d 1550, 1552 (Fed. Cir. 1994) (finding no suggestion in the prior art's generic formula to select a particular combination of variables that would give rise to the selection and thus, obviousness of Applicant's invention).

In addition, this deficiency cannot be cured by Dunne, which is relied upon for teaching an aerosol container. *See In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999). Dunne is directed to a process and a discharge value assembly for regulating the flow of a liquid product from an aerosol container. Abstract; Col. 1, line 54-Col. 2, line 4. Thus, Dunne does not teach or suggest the polycondensate claimed by Appellant.

The Office had the opportunity to further clarify and attempt to meet the requirements of a *prima facie* case of obviousness with the issuance of the Advisory Action dated January 29, 2004. This opportunity, however, was missed. Instead, the Office dismissed Applicants' argument as not persuasive and asserted that "there appears to be no criticality associated with the above mentioned diol containing at least one acid group because the acid will be consumed in the process of making polyurethane." Advisory Action dated January 20, 2004 at Continuation Sheet. Further, the Office stated that without specific molar ratios resulting in an excess of acid, Mougin meets the claimed elements. *Id.*

Applicants submit that the Office has yet to indicate that Mougin even provides for each and every element in Applicants' claims. "If the examiner does not produce a *prima facie* case, the Applicant is under no obligation to submit evidence of nonobviousness." M.P.E.P. § 2142. Thus, without first establishing a *prima facie* case of obviousness, whether there is a criticality associated with the diol or not is of no consequence.

As provided *supra*, without further direction or identified parameters in Mougin to select between a diol, a diamine, an alcoholamine or mixtures thereof, and then further to select whether the radical will carry an anionizable or cationizable group(s) giving rise to Appellants claims, this disclosure is to endless possibilities and does not render obvious Appellants' claims. *See Baird*, 16 F.3d at 382, 29 U.S.P.Q.2d at 1552. Instead, what Mougin teaches is, at best, what was "obvious to try." Mougin's disclosure provides for diols, diamines, alcoholamines and mixtures thereof as coupling agents

that may carry both anionic groups, i.e., acids and cationic groups, i.e., bases. Col. 4, lines 17-27. Because four large classes of compounds are disclosed with a spectrum of functional groups, Mougin's teaching provides, at best, only general guidance as to the particular form of Applicants' claimed invention. *See In re O'Farrell*, 853 F.2d 894, 7 U.S.P.Q.2d 1673 (Fed. Cir. 1988). The Office, however, cannot base a determination of obviousness on what the skilled person might try or find obvious to try. *Id.* Rather, the proper test requires determining what the prior art would have lead the skilled person to do, which the Office has not shown. *Id.*

Thus, the Office has failed in two respects to establish a *prima facie* case of obviousness. First, the combined references do not teach each and every claim limitation. *See* M.P.E.P. § 2143.03. Second, the rejection is improper because the Office merely asserts a conclusion without any evidence of record supporting this conclusion. Accordingly, this rejection should be withdrawn.

V. Conclusion

For the reasons set forth above, Appellants maintain that a *prima facie* case of obviousness has not been established based on the combination of the cited references. The Examiner failed to demonstrate that the references suggest or teach each and every element recited in Applicants' claims 1-29. Thus, Appellants respectfully request reversal of the rejection of claims 1-29 under 35 U.S.C. § 103(a).

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Appeal Brief, such extension is hereby respectfully requested. If there are

any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.

Dated: April 6, 2004

By: _____
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APPENDIX – CLAIMS ON APPEAL

1. An aerosol device comprising:

(a) a container containing a composition formed of a fluid and at least one propellant, and

(b) means for distributing the composition,

wherein:

(i) the composition comprises, in a cosmetically acceptable medium, at least one polycondensate comprising at least one sequence chosen from polyurethane and polyureas, and

an organic solvent, wherein the weight ratio of the propellant to the organic solvent is greater than or equal to 1.5:1; and

(ii) the device is suitable for giving an initial flow rate of aerosol composition of less than or equal to 0.75 gram per second,

wherein said at least one polycondensate is formed by an arrangement of blocks, this arrangement being obtained from:

(1) at least one compound which contains at least two active hydrogen atoms per molecule;

(2) at least one diol containing at least one functional group chosen from acid radicals and slats thereof; and

(3) at least one isocyanate chosen from di- and polyisocyanates.

2. The device according to claim 1, wherein said initial flow rate of aerosol composition is less than or equal to 0.7 gram per second.

3. The device according to claim 1, wherein said fluid contains an organic solvent, the weight ratio of said propellant to said organic solvent being greater than or equal to 1.75:1.

4. The device according to claim 1, wherein said at least one compound (1) is chosen from diols, diamines, polyesterols, and polyetherols.

5. The device according to claim 1, wherein said at least one diol (2) is a 2,2-hydroxymethylcarboxylic acid.

6. The device according to claim 1, wherein said at least one isocyanate (3) is chosen from hexamethylene diisocyanate, isophorone diisocyanate, toluylene diisocyanate, diphenylmethane 4,4'-diisocyanate dicyclohexylmethane 4,4'-diisocyanate, methylenebis(p-phenyl) diisocyanate, methylenebis(4-cyclohexyl isocyanate), isophorone diisocyanate, toluene diisocyanate, 1,5-naphthalene diisocyanate, 4,4'-diphenylmethane diisocyanate, 2,2'-dimethyl-4,4'-diphenylmethane diisocyanate, 1,3-phenylene diisocyanate, 1,4-phenylene diisocyanate, mixtures of 2,4- and 2,6-toluene diisocyanate, 2,2'-dichloro-4,4'-diisocyanatodiphenylmethane, 2,4-dibromo-1,5-diisocyanatonaphthalene, butane 1,4-diisocyanate, 1,6-hexane diisocyanate, and 1,4-cyclohexane diisocyanate.

7. The device according to claim 1, wherein said polycondensate is formed from at least one additional compound having a silicone skeleton.

8. The device according to claim 7, wherein said at least one additional compound having a silicone skeleton is chosen from polysiloxanes, polyalkylsiloxanes,

and polyarylsiloxanes, and wherein said polysiloxanes, polyalkylsiloxanes, and polyarylsiloxanes optionally containing hydrocarbon-based chains grafted onto said silicon atoms.

9. The device according to claim 8, wherein said polyalkylsiloxane is chosen from polyethylsiloxanes and polymethylsiloxanes, and said polyarylsiloxane is chosen from polyphenylsiloxanes.

10. The device according to claim 1, wherein said at least one sequence chosen from polyurethanes and polyureas has a repeating base unit corresponding to the formula (I):

-X-B-X-CO-NH-R-NH-CO- (I)

in which:

- X is chosen from O and NH,
- B is a hydrocarbon-based radical, this radical being substituted or unsubstituted, and
- R is a divalent radical chosen from aromatic alkylene radicals, C_1 to C_{20} aliphatic radicals, and C_1 to C_{20} cycloaliphatic radicals, these radicals being substituted or unsubstituted.

11. The device according to claim 10, wherein B is a hydrocarbon-based radical chosen from a C_1 to C_{30} divalent hydrocarbon-based radical.

12. The device according to claim 10, wherein R is a divalent radical chosen from hexamethylene, 4,4'-biphenylenemethane, 2,4- and/or 2,6-tolylene,

1,5-naphthylene, p-phenylene and methylene-4,4-bis-cyclohexyl radicals, and divalent radicals derived from isophorone.

13. The device according to claim 1, wherein said polycondensate has a repeating base unit corresponding to the formula (II):

-X-P-X-CO-NH-R-NH-CO- (II)

in which:

- P is a polysiloxane segment,
- X is chosen from O and NH, and
- R is chosen from divalent substituted and unsubstituted radicals chosen from aromatic alkylene radicals, C_1 to C_{20} aliphatic radicals, and C_1 to C_{20} cycloaliphatic radicals.

14. The device according to claim 1, wherein said polycondensate is present in an amount ranging from 0.1% to 20% by weight of the total weight of said composition.

15. The device according to claim 1, wherein said polycondensate is present in an amount ranging from 1% to 15% by weight of the total weight of said composition.

16. The device according to claim 1, wherein said polycondensate is present in an amount ranging from 2% to 8% by weight of the total weight of said composition.

17. The device according to claim 3, wherein said organic solvent is present in an amount ranging from 7.5% and 70% by weight of the total weight of said composition.

18. The device according to claim 3, wherein said organic solvent is present in an amount ranging from 10% and 50% by weight of the total weight of said composition.

19. The device according to claim 3, wherein said organic solvent is present in an amount ranging from 10% and 25% by weight of the total weight of said composition.

20. The device according to claim 1, wherein said propellant is present in an amount ranging from 15% and 85% by weight of the total weight of said composition.

21. The device according to claim 1, wherein said propellant is present in an amount ranging from 25% and 60% by weight of the total weight of said composition.

22. The device according to claim 1, wherein said propellant is present in an amount ranging from 30% and 50% by weight of the total weight of said composition.

23. The device according to claim 1, comprising a valve with a 0.33 mm internal restriction orifice, without an additional gas intake orifice, and with a nozzle orifice measuring from 0.33 to 0.51 mm in size.

24. The device according to claim 1, comprising a press-button having a turbulent nozzle, the nozzle orifice measuring from 0.4 and 0.5 mm in size.

25. The device according to claim 1, wherein said composition further comprises at least one cosmetic additive.

26. The device according to claim 25, wherein said at least one cosmetic additive is chosen from fatty substances, thickeners, softeners, antifoaming agents,

moisturizers, antiperspirants, basifying agents, dyes, pigments, fragrances, preserving agents, surfactants, hydrocarbon-based polymers, silicones, volatile silicones, non-volatile silicones, polyols, proteins, and vitamins.

27. The device according to claim 1, further comprising at least one fixing polymer chosen from nonionic, cationic, anionic, and amphoteric fixing polymers.

28. A process for shaping or maintaining a hairstyle, wherein said process comprises applying a hair styling composition with an aerosol device comprising:

(a) a container containing a composition formed of a fluid and at least one propellant, and

(b) means for distributing said composition,

wherein said composition comprises, in a cosmetically acceptable medium,

at least one polycondensate comprising at least one sequence chosen from polyurethanes and polyureas; and

an organic solvent, wherein the weight ration of said propellant to said organic solvent is greater than or equal to 1.5:1;

wherein said device is suitable for giving an initial flow rate of aerosol composition of less than or equal to 0.75 gram per second, and

wherein said at least one polycondensate is formed by an arrangement of blocks, this arrangement being obtained from:

(1) at least one compound which contains at least two active hydrogen atoms per molecule;

(2) at least one diol containing at least one functional group chosen from acid radicals and salts thereof; and

(3) at least one isocyanate chosen from di- and polyisocyanates.

29. A process for the production of a hair spray, said process comprising expelling a composition contained in an aerosol device, wherein said device comprises:

(a) a container containing said composition, and

(b) means for distributing said composition,

wherein said composition comprises, in a cosmetically acceptable medium,

at least one polycondensate comprising at least one sequence chosen from polyurethanes and polyureas, and

an organic solvent, wherein the weight ration of said propellant to said organic solvent is greater than or equal to 1.5:1;

wherein said device is suitable for giving an initial flow rate of aerosol composition of less than or equal to 0.75 gram per second, and

wherein said at least one polycondensate is formed by an arrangement of blocks, this arrangement being obtained from:

(1) at least one compound which contains at least two active hydrogen atoms per molecule;

(2) at least one diol containing at least one functional group chosen from acid radicals and salts thereof; and

(3) at least one isocyanate chosen from di- and polyisocyanates.